UNITED STATES OF AMERICA
BEFORE NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY

CTS CONSTRUCTION, INC. **Employer** **and,** **JAMES MONAHAN, II** **Petitioner** **and,** **LOCAL 4322, COMMUNICATIONS WORKERS OF AMERICA (CWA), AFL-CIO, CLC** **Union.**	**Case 09-RD-187368**

LOCAL 4322, COMMUNICATIONS WORKERS OF AMERICA (CWA), AFL-CIO, CLC BRIEF IN OPPOSITION TO PETITIONER'S AND EMPLOYER'S REQUESTS FOR REVIEW

Communications Workers of America, AFL-CIO, CLC and its Local 4322 (collectively "Union") hereby submit their Brief in Opposition to Petitioner's and Employer's Requests for Review pursuant to the Board's Rules and Regulations § 102.67(f). The Union moves that the Regional Director's decision be upheld and the Requests for Review be denied. The Union's Brief is attached hereto. The Union reserves the right to supplement this Brief as necessary.

Respectfully submitted,

s/ *Matthew R. Harris*

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BRIEF IN OPPOSITION

I. FACTS

On or about April 27, 2016, while the Union was attempting to negotiate a successor collective bargaining agreement, a decertification petition was filed in the affected bargaining unit (09-RD-174948). The Union filed a Request to Block on or about April 29, 2016, and contemporaneously filed a corresponding ULP Charge (09-CA-175155). The Request to Block was granted on May 2, 2016. The Union filed additional Charges thereafter (09-CA-177652; 09-CA-177660; 09-CA-177687; 09-CA-182889). The Charges were consolidated.

The decertification petition was approved for voluntary withdrawal on September 8, 2016. The Parties entered into a Settlement Agreement, which was approved by the Regional Director on September 23, 2016. Pursuant to that Agreement, the Employer agreed to refrain from serious misconduct such as,

1. providing assistance to the decertification effort,
2. failing and refusing to schedule regular bargaining sessions,
3. failing to designate a negotiating agent with the authority to bargain,
4. unilaterally granting pay increases without giving the Union an opportunity to bargain, and
5. telling employees their raises would be withheld because of Union activity.

Additionally, a mandatory bargaining schedule and notice posting were agreed to as part of the Settlement Agreement. The bargaining schedule requires the Employer to bargain a minimum of eighteen hours per month upon request. The bargaining commitments remain in effect. The Notice was posted on or about October 4, 2016, and mailed to employees individually

on or about October 10, 2016. The Settlement Agreement requires that the Notice remain posted for sixty days.

The Employer met with the Union only once after the Settlement Agreement was approved. On November 1, 2016, the Petitioner filed a decertification petition within the same affected bargaining unit (09-RD-187368). The Union filed its Position Statement and Request to Block on November 2, 2016. The Request to Block was granted on or about November 4, 2016. Subsequently, the Regional Director dismissed the Petition on November 17, 2016, finding, "The Board has held that, where an employer has entered into a settlement agreement requiring it to bargain with a union, the parties must be afforded a reasonable period of time in which to bargain for a contract and that any decertification petition filed after the execution and approval of the settlement agreement, and within that reasonable period of time must be dismissed."

On or about November 30, 2016, Petitioner, acting through counsel, filed a Request for Review in the above-captioned case (09-RD-187368). A copy was served on the Union on December 5, 2016. On or about December 1, 2016, the Employer filed a similar Request for Review. A copy was received by the Union on December 5, 2016.

II. STANDARD OF REVIEW

The Board's Rules and Regulations provide that a request for review will be granted "only where compelling reasons exist therefor." Board's Rules and Regulations § 102.67(d). A request for review may be granted only upon one or more of the following grounds: (1) That a substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent; (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (3) That the conduct of any hearing or any ruling made in connection with the proceeding

has resulted in prejudicial error; or (4) That there are compelling reasons for reconsideration of an important Board rule or policy. *Id*.

III. AUTHORITY AND ARGUMENT

A. The Board's Finding in *Truserv* is Dispositive and Restates Well-Settled Authority. The Regional Director's Citation of *Truserv* Was Therefore Wholly Appropriate.

Employer's Request for Review states that "*Truserv* is inapplicable" and the Regional Director "probably should have cited to the *Poole* case." (Emp. Req. for Rev. p. 3) Petitioner's Request for Review similarly rests much of its argument on *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952), failing to even mention *Truserv*.

In *Truserv*, 349 NLRB 227 (2007), the Board addressed the situation in which unlawful Employer conduct allegedly occurred, and a decertification was filed *before* the parties entered into a settlement agreement containing a non-admission clause. With respect to that situation (which is not at issue here), the Board held, "absent a finding of a violation of the Act, or an admission by the employer of such a violation, there is no basis for dismissing a petition based on a settlement of alleged but unproven unfair labor practices." *Id*. at 227-28. However, the Board was careful to distinguish the situation in which a decertification petition is filed *after* the parties enter into a settlement agreement, irrespective of the existence or non-existence of a non-admission clause (which is at issue here):

> In sum, an employer who agrees in a settlement agreement to bargain must do so for a reasonable period, and a decertification petition filed *after* such a settlement and during that reasonable period must be dismissed. . . . Of course, under *Poole Foundry*, the employer cannot thus benefit from a petition *filed* postsettlement. *See* 95 NLRB at 36; *Freedom WLNE-TV, Inc.*, 295 NLRB 634 (1989). Our decision today does not affect that precedent.

Id. at 230, 231 (emphasis original); *accord Poole*, 95 NLRB at 35; *see also NLRB Casehandling Manual I*, Section 10131.5(a).

In this respect, *Truserv* merely reaffirmed well-settled Board precedent. For example, in *Freedom WLNE-TV, Inc.*, 295 NLRB 634, 635 (1989), cited in *Truserv*, the Board upheld the dismissal of a decertification petition filed two months after the approval of a settlement agreement containing a bargaining commitment and a non-admission clause. On those facts, the Board decisively held:

> Where an employer, pursuant to a settlement agreement, has agreed to bargain with the union, the employer **must** bargain with the union for a reasonable time, and **no question concerning representation can be raised** during this period. *Shangri-La Health Care Center*, 288 NLRB 33(1988); *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951). **Thus, no decertification petition can be entertained during this period.** *Los Angeles Tile Jobbers*, 210 NLRB 789 (1974). Here, in light of the decertification petition having been filed prior to the Employer's satisfaction of its bargaining obligation pursuant to the settlement agreement, a reasonable period of time for bargaining had not elapsed before the petition was filed, and the petition **must be dismissed**.

(emphasis added) *Id*.

Similarly, in *Los Angeles Tile Jobbers, Inc.*, *supra*, 210 NLRB at 790, the Board dismissed a decertification petition filed four months after the employer committed in writing that it would bargain in good faith. Hence, the Board's finding in *Truserv* (as it relates to the instant case) represents an affirmation of already existing, well-settled authority, and the Regional Director's reliance thereupon was wholly appropriate.

B. The Board's Decision in *Poole* Supports the Regional Director's Decision.

1. *Poole* Stands for the Proposition that Approximately Three Months is Not a "Reasonable" Period of Time to Satisfy an Employer's Obligation to Bargain as Undertaken in a Settlement Agreement.

Petitioner and Employer cite *Poole*, *supra*, claiming the result in *Poole* dictates that the Regional Director's decision be overturned. In *Poole*, the parties entered into a settlement agreement on December 27, 1949[1]. *Id*. at 35.The settlement agreement provided that the employer would bargain with the union and would post notices for 60 days, informing employees of its intent to bargain. *Id*. The employer posted the notices and held two bargaining sessions until an employee filed a decertification petition on March 9, 1950--nearly three months after the settlement agreement was finalized. *Id*. The decertification petition was dismissed by the regional director. *Id*. The Board ultimately concluded that that three months was not a reasonable period of time to satisfy the Employer's obligations.[2] *Id*. at 36.

2. The Board's Analysis in *Poole* Centered on the Bargaining Commitment Contained in the Settlement Agreement, Not the Existence or Non-Existence of a Non-Admission Clause.

The Employer places great emphasis on the presence of a non-admission clause in the Settlement Agreement. However, the Board's analysis in *Poole*, to which the Employer cites heavily, did not focus on the existence or non-existence of a non-admission clause. Rather, the Board focused on the existence of the bargaining commitment undertaken by the employer, and whether the period for bargaining elapsing between the settlement agreement and the filing of the

[1] *Poole* was decided by the Board in 1951. Numerous cases, cited herein, have since clarified and elaborated on *Poole*, including *Truserv*.

[2] The Board generally imposes a mandatory minimum six month period after the parties execute a settlement agreement including a commitment to bargain, and in other similar circumstances. *Lift Truck Sales and Services, Inc*., 364 NLRB No. 47 (2016); *Americold Logistics*, 362 NLRB No. 58 (2015); *Lee Lumber and Bldg. Material Corp. (Lee Lumber II)*, 334 NLRB 399 (2001), enfd. 301 F.3d 209 (D.C. Cir. 2002).

decertification petition was sufficiently reasonable. *Id*. at 36. The Board noted, "[A] settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time **in which to conclude a contract**." (emphasis added) *Id*. Thus, the Board in *Poole* intimated that the Employer's bargaining obligation, undertaken in a settlement agreement, may only be satisfied once a collective bargaining agreement is reached.

Further, the Board's holding in *Freedom WLNE-TV, Inc., supra*, precludes the Employer's argument that a non-admission clause prohibits or otherwise impacts the dismissal of a decertification petition filed after a settlement agreement is reached.

The Employer's analysis of *Poole* is misguided. Not only does *Poole* support the Regional Director's decision, but *Poole* has been clarified in numerous cases decided by the Board over the years. The Employer's failure to cite or address many of these cases is telling. Rather, the Employer seeks to upend decades of well-settled Board authority and case law as a means to further its alleged unlawful activities. The Petitioner's Request for Review mirrors the Employer's. As such, both Requests for Review ought to be dismissed. The Regional Director made the appropriate decision and relied upon the appropriate authority.

C. The Regional Director's Decision Applied the Appropriate Authority to the Facts of this Case and Reached the Appropriate Conclusion.

A regional director's decision should not be disturbed unless there are substantial errors of law or fact, or for other compelling and substantial reasons. Board's Rules and Regulations § 102.67(d). The Employer has not satisfied its burden in demonstrating any substantive reason for disturbing the Regional Director's judgment in this case.

Here, the Employer was alleged to have committed a multitude of unfair labor practices, including aiding and assisting a decertification effort. The Employer entered into the Settlement

Agreement, requiring it to post a notice and bargain with the Union. During the compliance period, a decertification petition was filed. The Region dismissed the petition, citing *Truserv,* and held, "Here, the petition was filed after the execution and approval of the settlement agreement, within the 60-day Notice posting period, and just 7 days after the scheduled date for the parties' first post-settlement negotiating session." The Regional Director then concluded, "Thus, the parties have not been afforded a reasonable period of time to bargain."

In total, approximately thirty-nine (39) days elapsed between approval of the Settlement Agreement (September 23, 2016) and the filing of the petition (November 1, 2016). The Parties met on only one occasion during that time. In similar circumstances, the Board has found several months to be an insufficient period of time. *See Poole*, *supra*, 95 NLRB at 35; *Freedom WLNE-TV, Inc.*, *supra*, 295 NLRB at 636; *Los Angeles Tile Jobbers, Inc.*, *supra*, 210 NLRB at 212. Hence, thirty-nine days are wholly insufficient to satisfy the Employer's bargaining obligation and provide the Union with a legitimate chance of achieving a collective bargaining agreement.

The Employer is merely attempting to achieve the very result it was alleged to have unlawfully encouraged only a few months prior—the processing of a decertification petition. This is precisely the situation that has been discouraged by the Board in the past. In *Douglas-Randall*, 320 NLRB 431, 432 (1995), overruled on other grounds by *Truserv*, *supra*,[3] the Board found, "If a settlement agreement is to have real force . . . a reasonable time must be afforded in which a status fixed by the agreement is to operate. Otherwise, the settlement agreement might have little practical effect . . ." The Board went on to note that an Employer should not be permitted to "commit an unfair labor practice by refusing to bargaining collectively with an

[3] The facts of *Douglas-Randall* parallel those set forth in *Truserv* and are thus not at issue here. However, the Board's reasoning is particularly poignant.

incumbent union, sign a settlement agreement undertaking to bargain with that union, and then benefit from its unlawful conduct by having the union decertified or replaced because of dissatisfaction with the incumbent union arising from the unfair labor practice." *Id*. at 433.

The Board's reasoning in *Douglas-Randall* is applicable here. From a policy standpoint, the implications of permitting the employer to profit in this manner would be horribly corrosive to the Board's ability to nurture settlement agreements in lieu of litigation and would strongly discourage unions from entering into settlement agreements. Moreover, there is no compelling reason to disturb the judgment of the Regional Director. As such, the Employer's and Petitioner's Requests for Review ought to be dismissed.

IV. CONCLUSION

Because of the existence of the Settlement Agreement, the temporal proximity to the serious infractions alleged against the Employer, and well-settled Board precedent, cited above, the Regional Director's decision was appropriate and correct. For all of the above reasons, the Regional Director's decision ought to be upheld and the Requests for Review ought to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Board's Rules and Regulations §§ 102.67(f) and (i)(2), the undersigned hereby certifies that its Brief in Opposition to the Petitioner's and Employer's Requests for Review was filed electronically with the Office of the Executive Secretary on December 6, 2016. A copy was also submitted to the following individuals via regular U.S. mail and/or email.

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